Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MB Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MB Docket No. 01-317
	)	
Definition of Radio Markets	)	MB Docket No. 00-244

COMMENTS OF GANNETT CO., INC.

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SUMMARY

Today's media landscape is *dramatically different* from that which existed when the Commission last examined its media ownership rules in 2003 (and, of course, light years away from the era when traditional newspapers and broadcast stations solely dominated the media landscape). Three years ago, YouTube, podcasting, RSS and other new media developments did not exist. Blogs had not entered the consciousness of most Americans. At the same time, the challenges facing companies that professionally gather and publish local, national, and international news and information in a landscape where they are vying for consumers' attention and advertiser resources not only with their more traditional rivals, also but with Internet competitors, mobile devices, cellphones, video iPods, and a seemingly endless stream of upstart media, have become even more acute.

Gannett, a national media company that operates local television stations, daily newspapers and a variety of new media publications and businesses, is innovating to remain competitive with these new media trends. But, like all regulated media companies, it is doing so under the burden of increasingly outdated government restrictions. This proceeding, which opens a quadrennial review of these very media ownership rules and will address the issues raised by the opinion of the Third Circuit in *Prometheus v. FCC*, provides an essential opportunity for the Commission to square its regulatory approach with the realities of the current media marketplace. The Commission should provide the Third Circuit the reasoning to support its largely upheld repeal of the newspaper/broadcast ownership rule, and it should modify the television duopoly rule by eliminating the "top four" restriction.

Although the marketplace has evolved with lightning speed, the Commission's media ownership rules have remained in limbo, artificially constraining the ability of traditional media companies to compete in this multimedia universe. Most importantly, the limits on newspaper/broadcast cross-ownership and television duopolies that remain in place today continue to deny consumers the established and sizable benefits that can be achieved by more efficient combinations of resources in the media sector, *despite* the fact that the Third Circuit upheld the critical underpinnings of the Commission's decision to relax the rules. The task before the Commission, then, is imperative and straightforward—it must build upon the comprehensive record already before it, account for the profound changes that have taken place in the media marketplace since 2003 (as well as those that can be anticipated before its next review of the ownership rules in 2010), and move quickly to square the its regulatory regime with the realities of an astonishingly diverse and demanding marketplace.

Gannett consistently has asked the Commission to repeal the newspaper/broadcast cross-ownership ban. In 2003, based on the wide-ranging record before it (including comments from Gannett and similarly situated companies whose cross-owned newspaper/broadcast properties are super-serving their communities), the Commission concluded: "(1) the rule cannot be sustained on competitive grounds; (2) the rule is not necessary to promote localism (and in fact may harm localism) and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations." The Third Circuit resoundingly upheld these critical judgments concerning newspaper/broadcast cross-ownership.

In this proceeding, the Commission need only speak to the court's limited concerns regarding perceived flaws in the agency's viewpoint diversity analysis. In order to do so, it is not necessary for the Commission either to attempt to fix the flaws in the so-called Diversity Index ("DI") or to formulate an alternative diversity "metric." The DI was not an indispensable component of the Commission's decision to eliminate the blanket cross-ownership ban. There is more than adequate evidence in the record of this proceeding to more fully explain the changes the Commission made to this rule. Similarly, alternative methods purporting to measure precisely the relative importance of local news and informational outlets would not resolve, but would senselessly complicate, the agency's analysis.

Instead, the Commission should focus on whether consumers in individual media markets have a sufficient number of news and informational outlets available to them so as to ensure that they will be well-informed and exposed to a variety of viewpoints. In this digital era, particularly given the evolution of the Internet into a fundamental and widely-utilized source of world, national, and local news and information as well as diverse opinion, there is no question that audience members in local markets of all sizes are abundantly well-served by a vast range of traditional and alternative media outlets. Accordingly, the restrictions on newspaper/broadcast cross-ownership should be repealed.

With respect to television duopolies, the Commission concluded in 2003 that common ownership of same-market local television stations does not hamper and, in fact, can promote localism, diversity, and competition. The Third Circuit did not disturb any of these critical findings on appeal. Again, the Commission's task in the instant proceeding is clear-cut. As a result of the changing nature of the television broadcast industry and the striking developments in the competitive media landscape in recent years, the local television ownership rule, as it currently exists, is not "necessary in the public interest." and, is, in fact, disserving viewers.

The unique dynamics of local television broadcasting suggest that "bottom up" rather than "top down" deregulation might better serve the public interest. The number of outlets in all media markets is such that no single entity is likely to gain an anticompetitive advantage that could result in harm to consumers, or is even remotely able to monopolize debate. Meanwhile, the challenges facing free, over-the-air television broadcasting are keen. The myriad choices available to today's consumers have resulted in a migration away from television broadcast viewing and a drop in advertising revenue. Broadcasters in small and medium markets have been particularly hard hit. Because many of the costs of operating a television station are fixed costs, operating a small market station is not necessarily less expensive than a larger market station. In addition, the price differential between local television advertising spots and other means of reaching local consumers typically is lower in smaller markets than in large markets, which suggests that broadcast television may face particularly spirited competition from a broader array of alternative media in those markets.

The truth is, duopoly restrictions actually *harm* both viewpoint diversity and programming diversity. Given increasing competitive pressures, the rising costs of producing and airing the types of news and informational programming that most often communicate viewpoints, and unable to avail themselves of the benefit of the efficiencies and synergies associated with common ownership because of the Commission's constraints, some broadcasters have cut back the production of news and public affairs programming or discontinued it altogether. Conversely, as has been Gannett's experience, same-market television combinations consistently provide enhanced news and public affairs offerings.

Local television combinations have been shown to be especially beneficial in smaller markets, where local television service may be limited to the ABC, CBS, NBC, and Fox affiliates. Because, on its face, the Top Four restriction would prohibit duopolies in markets where television combinations do the most good, it should be eliminated.

Finally, with respect to both rules, in the unlikely event that a television group owner or newspaper publisher attempted to engage in anticompetitive behavior notwithstanding the natural discipline provided by the marketplace, any concerns would remain subject to government scrutiny and remediation under the federal antitrust regime and state unfair competition laws, which sufficiently protect against any isolated danger to competition in specific local markets.

In sum, the Commission should act expeditiously to more completely explain to the Third Circuit its decision to repeal the newspaper/broadcast cross-ownership ban, and it should liberalize the television duopoly rule.

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COMMENTS OF GANNETT CO., INC.

I. INTRODUCTION

Gannett Co. Inc. ("Gannett") owns 23 broadcast television stations covering 18.05 percent of U.S. television households. The company publishes 90 daily newspapers in the U.S., including USA TODAY and suburban and neighboring city newspapers adjacent to major cities. In addition, Gannett owns a variety of non-daily and new media publications and businesses.

Gannett consistently has asked the Commission to repeal the newspaper/broadcast cross-ownership ban and give newspaper owners and broadcasters the freedom to serve the public more comprehensively and compete more effectively in today's multi-channel, multi-outlet world. The public interest benefits accruing from Gannett's Phoenix newspaper/television/website combination and others like it are exceptional and longstanding. Gannett's experience with television duopolies compels it to suggest that the local television ownership rule also should be liberalized. In the three years since the Commission's *2002 Biennial Review Order*,[1] as an increasingly splintered marketplace demands that traditional media companies become *multimedia* companies in order to remain competitive, the need for such regulatory relief has become more acute, and the justifications for lifting artificial media ownership constraints are even more powerful.

The Commission's Further Notice of Proposed Rulemaking ("*Further Notice*")[2] opens a quadrennial review of the media ownership rules, and asks how the Commission should address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus v. FCC.*[3] That decision wholeheartedly endorsed the Commission's decision to repeal the newspaper/broadcast cross-ownership ban and acknowledged the agency's considerable discretion to relax the local television

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[1] [1]*See 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules*, 18 FCC Rcd 13,620 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

[2] *2006 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; 2002 Biennial Regulatory Review -- Review of the Comm'n's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets; Definition of Radio Markets*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006) ("*NPRM*"); *2006 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Order, DA 06-1663 (rel. Sept. 18, 2006) (order extending comment deadline until Oct. 23, 2006 and the reply comment deadline until Dec. 21, 2006).

[3] *Prometheus*, 373 F.3d 372 (3d Cir. 2004).

ownership rule.[4] With respect to both rules, therefore, the task before the Commission is straightforward.

The Commission need not start from scratch in gathering an evidentiary record and formulating its analysis. The agency already has accumulated a comprehensive record from a full gamut of interested parties concerning the potential public interest benefits and lack of corresponding harms associated with relaxation of its media ownership rules.[5] In responding to the court and consistent with its statutory obligation to ensure that its ownership rules keep pace with competitive developments, the Commission need not revisit what the court has sanctioned. Rather, it should take stock of the dramatic changes that have occurred in the media marketplace over the last three years and revise its rules accordingly. Federal courts consistently have recognized the Commission's authority and unique expertise in this area, as well as the agency's need to make certain predictive judgments. The ongoing information revolution and corresponding challenges facing the traditional media undoubtedly will continue unabated. Any determinations the Commission makes with regard to its ownership rules

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[4] *2002 Biennial Review Order*, 18 FCC Rcd at 13,747.

[5] *See Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13,003 (1996) (MM Docket No. 96-197 established Oct. 1996); *1998 Biennial Regulatory Review-Review of the Comm'n's Broad. Ownership Rules and Other Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11,276 (1998) (MM Docket No. 98-35 established Mar. 1998); *2000 Biennial Regulatory Review*, Staff Report, CC Docket No. 00-175 (established Sept. 2000); *Cross-Ownership of Broad. Stations and Newspapers; Newspaper/Radio Cross-Ownership Policy, Order and Notice of Proposed Rulemaking*, 16 FCC Rcd 17,283 (2001) (MM Docket No. 01-235 established Sept. 2001); *2002 Biennial Regulatory Review-Review of the Comm'n's Broad. Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets-Definition of Radio Markets*, Notice of Proposed Rulemaking, 17 FCC Rcd 18,503 (2002) (MB Docket No. 02-277 established Sept. 2002); *NPRM*, 21 FCC Rcd 8834.

in this proceeding should thus be particularly forward-looking, given that Congress has now directed the agency to review its rules every four—rather than every two—years.[6]

The Third Circuit resoundingly upheld the Commission's critical judgments concerning newspaper/broadcast cross-ownership. In particular, the court upheld the determination that the ban could not be justified and that elimination of the prohibition would *promote* the Commission's public interest goals of competition, localism, and diversity.[7] In this proceeding, the Commission need only speak to the court's limited concerns regarding perceived flaws in the agency's viewpoint diversity analysis—particularly, its objections to the so-called Diversity Index ("DI").[8] In order to do so, it is not necessary for the Commission either to attempt to fix the flaws in the DI or to formulate an alternative diversity "metric." The DI was not an indispensable component of the Commission's decision to eliminate the blanket cross-ownership ban.[9] Moreover, the inherently subjective concept of diversity, coupled with the complex nature of news and information consumption in today's media marketplace, makes such an exercise hopelessly frustrating and ultimately futile.

Similarly, alternative methods purporting to measure precisely the relative importance of local news and informational outlets would not resolve, but would senselessly complicate, the agency's analysis. The Commission should instead focus on whether consumers in individual media markets have a sufficient number of news and

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[6] *See* Telecom. Act of 1996, Pub. L. No. 104-101, 110 Stat. 56, § 202(h) (1996) (codified as amended at 47 U.S.C. § 202(h)); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (amending section 202(h)).

[7] *See Prometheus*, 373 F.3d at 399-400.

[8] *See id.* at 402-11.

[9] *See, e.g., 2002 Biennial Review Order*, 18 FCC Rcd at 13,776 (¶ 391).

informational outlets available to them so as to ensure that they will be well-informed and exposed to a variety of viewpoints. As the record will demonstrate, viewed from this perspective, there is no question that, in this digital era, audience members in local markets of all sizes are abundantly well-served by a broad and diverse range of traditional and alternative media outlets. Accordingly, the restrictions on newspaper/broadcast cross-ownership should be eliminated in their entirety.

In its *2002 Biennial Review Order*, the Commission found that common ownership of same-market local television stations does not hamper and, in fact, can promote localism, diversity, and competition.[10] The Third Circuit did not disturb any of these critical findings on appeal, leaving the Commission free to determine that relaxation of the local television ownership rule is appropriate.[11] Again, the Commission's task in the instant proceeding is clear-cut. As a result of the changing nature of the television broadcast industry and the striking developments in the competitive media landscape in recent years, the local television ownership rule as it currently exists can no longer be justified as "necessary in the public interest," and, in fact, is disserving viewers. It should be revised to remove unnecessary constraints on the ability of free, over-the-air broadcast stations to better serve their communities.

Now, more than ever, the question confronting media companies "is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the

[10] *See id.* at 13,747-48 (¶¶ 328-30).

[11] *See Prometheus*, 373 F.3d at 399-400.

attention of Americans."[12] In today's environment, where consumers in all markets can avail themselves of a panoply of independent media options, it is unambiguously clear that the newspaper/broadcast cross-ownership ban and the existing local television ownership rule are distant echoes of the past. The rules are not necessary to promote—and in fact hinder—the three public interest goals upon which the Commission's media ownership rules traditionally have been founded. Moreover, they deprive the American public of the significant benefits that can be achieved by more efficient combinations of resources in the media sector. The rules should be revised accordingly.

II. <u>THE COMMISSION SHOULD REPEAL THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE</u>

A. <u>The Commission Need Only Conduct a Limited Review of the Issues Related to Newspaper/Broadcast Cross-Ownership</u>

1. The Commission Already Has Amassed an Enormous and Comprehensive Record Demonstrating That Repeal of the Anachronistic Ban Will Serve the Public Interest

It is important to note that the newspaper/broadcast cross-ownership ban has now been in existence, without *any* modification, *for more than three decades*. Even when it adopted the rule, the Commission acknowledged that its foundation was speculative.[13] Since 1996, the Commission has launched *six* notice and comment proceedings to examine the absolute ban on newspaper/broadcast cross-ownership.[14] The agency's most

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[12] *2002 Biennial Review Order*, 18 FCC Rcd. at 13,766 (¶ 367).

[13] *Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F.C.C. 2d 1046, 1078 (1975) ("*1975 Multiple Ownership Report*").

[14] *See Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13,003 (1996) (MM Docket No. 96-197 established Oct. 1996); *1998 Biennial Regulatory Review-Review of the Comm'n's Broad. Ownership Rules and Other Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11,276 (1998) (MM Docket No. 98-35 established Mar. 1998); *2000 Biennial Regulatory Review*, Staff Report, CC Docket No. 00-175 (established Sept. 2000); *Cross-Ownership of Broad. Stations and Newspapers; Newspaper/Radio Cross-*

recent undertaking, the *2002 Biennial Review*, spanned 20 months and resulted in a public record comprised of more than 520,000 comments.[15] In conjunction with its 2002 proceeding, the agency also established a Media Ownership Working Group ("MOWG"), which commissioned twelve studies, including several that focused specifically on issues related to newspaper/broadcast cross-ownership.[16] The Third Circuit acknowledged that "interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to respond to the issues identified" by the Commission.[17]

On the basis of the massive and comprehensive record in existence three years ago, the Third Circuit unequivocally upheld the Commission's determination that it could no longer justify retention of the newspaper/broadcast cross-ownership rule as necessary in the public interest.[18] Yet, the long outdated cross-ownership rule persists in unnecessarily precluding broadcasters from operating more efficiently and bringing higher quality, more diverse news and informational programming to viewers and listeners in their communities. The comments submitted in this supplemental proceeding

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Ownership Policy, Order and Notice of Proposed Rulemaking, 16 FCC Rcd 17,283 (2001) (MM Docket No. 01-235 established Sept. 2001); *2002 Biennial Regulatory Review-Review of the Comm'n's Broad. Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets-Definition of Radio Markets*, Notice of Proposed Rulemaking, 17 FCC Rcd 18,503 (2002) (MB Docket No. 02-277 established Sept. 2002); *NPRM*, 21 FCC Rcd 8834; *2006 Quadrennial Regulatory Review*, MB Docket No. 06-121 (launched July 2006).

[15] *2002 Omnibus Media Ownership News Release*, 2003 FCC LEXIS at 3121.

[16] *See, e.g.*, Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 (Sept. 2002); David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations*, released in MB Docket No. 02-277 (Sept. 2002).

[17] *Prometheus*, 373 F.3d at 386.

[18] *Id.* at 400.

will not only reinforce the Commission's initial conclusions about the rule, but also demonstrate that complete repeal of the newspaper/broadcast cross-ownership ban is justified and long overdue.

2. The Third Circuit Upheld the Critical Determinations Underlying Repeal of the Newspaper/Broadcast Cross-Ownership Ban

In its *2002 Biennial Review Order*, the Commission concluded that its absolute ban on newspaper/broadcast cross-ownership could no longer be substantiated and that elimination of the prohibition would *promote* the Commission's public interest goals of competition, localism, and diversity.[19] Specifically, the Commission stated: "(1) the rule cannot be sustained on competitive grounds; (2) the rule is not necessary to promote localism (and in fact may harm localism) and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations."[20]

The Third Circuit addressed the three public interest goals underpinning the Commission's newspaper/broadcast cross-ownership rule—competition, localism, and diversity—seriatim. First, the Commission found that elimination of the ban would "not adversely affect competition in any product market."[21] No party directly challenged this aspect of the Commission's *2002 Biennial Review Order*,[22] and the Third Circuit expressly agreed with the agency's determination that "repealing the cross-ownership ban was necessary to promote competition."[23]

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[19] *2002 Biennial Review Order*, 18 FCC Rcd at 13,747 (¶ 327); *NPRM*, ¶ 24.

[20] *2002 Biennial Review Order*, 18 FCC Rcd at 13,748 (¶ 330).

[21] *2002 Biennial Review Order*, 18 FCC Rcd at 13,749 (¶ 332); *NPRM*, ¶ 24.

[22] *Prometheus*, 373 F.3d at 398.

[23] *Id.* at 400-01; *see NPRM*, ¶ 28.

Second, the Court accepted the Commission's conclusion that restrictions on newspaper/broadcast cross-ownership were "not necessary to promote broadcasters' provision of local news and information," and, most significantly, that the existing ban "actually works to inhibit such programming."[24] In addition to studies demonstrating that newspaper-owned television stations provide *almost fifty percent* more local news and community affairs programming than non-newspaper owned stations, [25] compelling real-world examples provided by operators of existing newspaper-broadcast combinations, including Gannett, supported these conclusions.[26]

This evidence convincingly "illustrate[d] how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community, "[27] the Commission said. The agency further noted that this was not at all surprising, as "[t]hese results flow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies . . . which can be realized through ownership of two media outlets."[28] The Third Circuit agreed that the outright

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[24] *2002 Biennial Review Order*, 18 FCC Rcd at 13753 (¶ 342).

[25] *Id.*

[26] The Commission highlighted anecdotes in the record that illustrate how efficiencies resulting from cross-ownership translate into better local service. These efficiencies are particularly important, the FCC said, "as consumers demand almost instantaneous delivery of news – both locally and nationally – and even more in-depth coverage of complex issues." *Id.* at 13,756 (¶ 348). It noted that "the quantity and diversity of area news coverage [Gannett] provides has increased as a result of its ability to leverage the combined resources of the two [Phoenix] outlets." *Id.* Moreover, Gannett's "media integration has improved efficiency, particularly in situations characterized by fast breaking news, such as the massive wildfires near Phoenix last year, while the journalists at each outlet retain discretion and exercise independent judgment. *Id.*

[27] *Id.* at 13,756 (¶ 347).

[28] *Id.*; *see NPRM*, ¶ 24.

ban on newspaper-broadcast cross-ownership was not necessary to further the Commission's localism objective.[29] Specifically, the court found that the ban is counterproductive because it retards the production of more and higher quality local news and other local programming.[30]

Consequently, the Commission need only address the third goal of viewpoint diversity. In 2002, the Commission concluded that "a blanket prohibition on the common ownership of broadcast stations and daily newspapers . . . can no longer be justified as necessary to achieve and protect diversity."[31] Again, the agency cited evidence demonstrating that cross-ownership "creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public."[32] The Commission emphasized that "[t]raditional modes of media . . . have greatly evolved since the Commission first adopted media ownership rules . . . and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more [audience] control" than ever before.[33]

The Third Circuit affirmed the Commission's determination that the ban was not necessary to promote diversity.[34] "The Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform

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[29] *Prometheus*, 373 F.3d at 398-99; *see NPRM*, ¶ 28.

[30] *Id*.

[31] *2002 Biennial Review Order*, 18 FCC Rcd at 13760 (¶ 355); *see NPRM*, ¶ 24.

[32] *Id.*

[33] *Id*.

[34] *Prometheus*, 373 F.3d at 399-400; *see NPRM*, ¶ 28.

bias to warrant sustaining the cross-ownership ban,"[35] the court stated. The Court of Appeals further agreed that "record evidence suggests that cable and the Internet supplement the viewpoint diversity provided by broadcast and newspaper outlets in local markets," rendering it perfectly "acceptable for the Commission to find that [these media] contribute to viewpoint diversity."[36] As discussed below, the Third Circuit merely identified certain faults with the Commission's underlying methodology of identifying those markets potentially lacking in viewpoint diversity, and asked the Commission to better justify its line drawing.[37]

3. As the Expert Agency, the Commission Has Considerable Latitude and Need Address Only the Court's Limited Concerns About the Diversity Index

It cannot be disputed that the Third Circuit categorically upheld the key underpinnings of the Commission's decision to repeal its absolute ban on newspaper/broadcast cross-ownership.[38] The agency's objective, therefore, should not extend beyond addressing the very limited and specific concerns identified by the Third Circuit concerning the methodology the Commission utilized in attempting to measure viewpoint diversity.

The Commission concluded that the only reason to retain some limits on cross-ownership was to guard against "an elevated risk of harm to the range and breadth of viewpoints that may be available to the public."[39] The court endorsed the Commission's

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[35] *Prometheus*, 373 F.3d at 399-400..

[36] *Id*.

[37] *Id.*

[38] *Id.*

[39] *2002 Biennial Review Order*, 18 FCC Rcd at 13,793 (¶ 442).

attempt to "avoid needlessly overregulating markets with already ample viewpoint diversity."[40] The Third Circuit took issue only with the use of the DI in devising new cross-media limits.[41] Specifically, the court found fault with the design and application of the DI "to identify 'at risk' local markets—those with high levels of viewpoint concentration—where continued regulation was necessary."[42]

As the *Further Notice* recognizes, the court's remand was, therefore, quite narrow.[43] The Commission already has completed the bulk of the work necessary to reach a decision concerning newspaper/broadcast cross-ownership, and its determinations in large part were upheld by the appellate court. In this proceeding, the agency should build on its prior efforts rather than repeating them, and focus simply on addressing the limited concerns that the Third Circuit expressly articulated in the context of today's media marketplace.

The Commission has considerable latitude in this area.[44] Chief Judge Scirica, although dissenting in other areas of the opinion, agreed with the panel majority on this point: "Given the dynamic nature of the industry, the task of crafting a regulatory structure that reflects the realities of the media marketplace requires the Commission to make predictive judgments about the future."[45] The federal courts, reviewing FCC

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[40] *Prometheus*, 373 F.3d at 402.

[41] *Id.* at 402-11; *see NPRM*, ¶ 28.

[42] *Id*. at 402.

[43] *Id.* at 402-11; *see NPRM*, ¶ 28.

[44] *Prometheus*, 373 F.3d at 389-90.

[45] *Id.* at 439 (Scirica, C.J., dissenting).

decisions under the Administrative Procedure Act,[46] "have consistently recognized the Commission's authority and unique expertise in making such estimations."[47] The Supreme Court has acknowledged that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"[48]

Given this context, it would be counterproductive for the Commission to attempt to reformulate the DI or, for that matter, to consider an alternative "metric" for measuring viewpoint diversity in any given market. Fundamental to the Commission's determination to eliminate its flat ban on cross-ownership was not the DI, but the impressive records of existing combinations, the significant public interest benefits to be gained through common ownership, and the evidence regarding the explosive growth in local media outlets since the ban was implemented.[49] In fact, the *2002 Biennial Review Order* expressly stated that the DI "informs, but does not replace [the Commission's] judgment in establishing rules of general applicability that determine where it should draw lines between diverse and concentrated markets."[50]

While the fate of the newspaper/broadcast cross-ownership rule has remained in limbo, the media marketplace continues to evolve with lightning speed, thus further

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[46] 5 U.S.C. § 500 et seq.

[47] *Prometheus*, 373 F.3d at 439 (citing *Cellco*, 357 F.3d at 98).

[48] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

[49] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,747-75 (¶¶ 327-90).

[50] *Id.* at 13,776 (¶ 391).

simplifying the task before the Commission. As demonstrated below, the ever-accelerating pace of technical innovation and growth in media outlets renders any need to identify markets where common ownership of a newspaper and a broadcast station "might" result in any appreciable loss in diversity obsolete.

B. <u>The Case For Repeal Of The Newspaper/Broadcast Cross-Ownership Ban Has Become Even More Compelling Since The *2002 Biennial Review Order*</u>

The Third Circuit's ruling makes clear that the Commission bears a heavy burden in this proceeding to update its rules to reflect current market realities. As the Commission previously has explained, and as the appellate court agreed, "[t]he text and legislative history of the 1996 Act indicate that Congress intended periodic reviews" under Section 202(h) "to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace' resulting from that Act's relaxation of the Commission's regulations, including the broadcast media ownership regulations."[51] Indeed, the Third Circuit confirmed that Section 202(h) explicitly "[r]ecogniz[es] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules."[52]

Since 2003, the number of independent media offerings available to consumers has proliferated at a staggering pace. An extraordinary assortment of print, audio, and video media either have been newly created or have developed into multi-faceted and

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[51] *Prometheus*, 373 F.3d at 391 (quoting *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (¶¶ 16, 17) (2003); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13,624-25 (¶¶ 10-12); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 502-03 n.20 (2002) (noting the "deregulatory and competitive purposes of the [1996] Act"); *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997) (recognizing the 1996 Act's overarching goals of "reduc[ing] regulation").

[52] *Prometheus*, 373 F.3d at 391.

widely-used alternatives. The World Wide Web continues to evolve as a fundamental source of both national and local news and information. The Internet's contributions range from the websites of traditional media outlets—which disseminate more timely, differentiated, and extensive information online than is feasible through traditional print or broadcast means—to sites maintained by an ever-expanding range of wholly independent entities.

Consumers in *every* market in the United States have an overwhelmingly large and diverse menu of traditional and alternative options from which to obtain news, entertainment, and information, including local news and information. Particularly when weighed against the substantial documented public interest benefits accruing from commonly owned newspapers and broadcast stations, the contention that government intervention to constrain newspaper/broadcast cross-ownership is necessary to preserve viewpoint diversity in any market cannot be sustained.

1. The Media Marketplace Has Become Increasingly Diverse

When the Commission wrote in the *2002 Biennial Review Order* that "[t]he modern media marketplace is dramatically different from the media world sixty years ago,"[53] it intended to compare the media landscape of 2002 to the one that existed in 1941. The same words—*dramatically different*—can aptly be used to compare today's media landscape with that which existed a scant three years ago. An unprecedented host of competitors offer today's consumers rich and varied sources of news information and entertainment. Today, a new medium can reach critical mass in less than two years and a new voice can reach millions in less than a minute. When the Commission last

[53] *2003 Biennial Review Order*, 18 FCC Rcd at 13,648 (¶ 87).

considered whether cross-ownership restrictions were necessary to promote viewpoint diversity in certain markets, YouTube and podcasting did not exist. Blogs had not entered the consciousness of most Americans. Even media technologies now considered mature, such as satellite radio and digital audio players, were in their nascence. Consumers did not have instant access to news resources, information, and viewpoints from around the corner or around the globe based on a simple search of Google News or Yahoo. Arguably, the Internet did not have the abundance of "hyper-local" offerings available today. As detailed in the comments being filed in this proceeding by the Newspaper Association of America ("NAA"), of which Gannett is a member, both the sheer number and the diversity of media outlets available in markets across the country have proliferated astoundingly since 2003.

The Commission emphasized the importance of crafting its media ownership rules so as to "give recognition to the changes which have taken place and to see to it that [they] adequately reflect the situation as it is, not was."[54] In this proceeding, then, the agency must recognize the profound changes that have taken place in the media marketplace since 2003, and those that can be anticipated before the Commission's next review of the ownership rules in 2010.

Certainly, nothing has contributed to the explosion in the number of informational outlets available to media consumers more than the World Wide Web. The Internet, which the Third Circuit questioned as a meaningful source of local news and information,[55] has itself diversified and exponentially increased its prodigious reach.

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[54] *Id.* at 13,767 (¶ 367) (quoting *1975 Multiple Ownership Report*, 50 F.C.C.2d at 1075).

[55] *See Prometheus*, 373 F.3d at 406-08.

As a preliminary matter, the ubiquity of the Internet has advanced considerably since 2003.[56] The latest FCC report on Internet access found that high-speed connections are available in 99 percent of United States ZIP codes.[57] Seventy-four percent of Americans now have Internet access in their homes,[58] a penetration level that is greater than that for cable television[59] or cell phones.[60] For Americans who do not have an Internet connection in their homes, the options for accessing the web elsewhere are plentiful. In 2004, 98.9 percent of all public libraries offered free access to the Internet, with nearly half of libraries supplying high-speed connections.[61] Many municipalities offer or plan to provide wireless Internet either for free or at very low cost.[62] Roughly 137 million adult Americans used the Internet in 2005, as opposed to under 60 million in

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[56] The Third Circuit criticized the importance the FCC assigned to the Internet in assessing diversity, in part because Internet access was not "universally available." *Prometheus*, 373 F.3d at 407-08.

[57] Industry Analysis and Technology Division, Wireless Competition Bureau, High-Speed Services for Internet Access: Status as of December 31, 2005 (July 2006).

[58] NetRatings, Inc., Press Release, Two-Thirds Of Active U.S. Web Population Using Broadband, Up 28 Percent Year-Over-Year To An All-Time High, According To Nielsen//NetRatings (March 14, 2006).

[59] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, MB Docket No. 05-255, 21 FCC Rcd 2503, 2506-07 (¶ 8) ("*Twelfth Annual Video Competition Report*").

[60] CTIA, Wireless Quick Facts (April 2006), http://www.ctia.org/research_statistics/statistics/index.cfm/AID/10202 (last visited Oct. 20, 2006).

[61] Press Release, Information Use Management And Policy Institute, College Of Information, Florida State University, June 2005, New Report: Public Libraries Connect People to Technology but Face Challenges in Sustaining Service (June 2005).

[62] *See* San Francisco TechConnect, www.sfgov.org/techconnect (last visited Oct. 11, 2006); Wireless Philadelphia, www.wirelessphiladelphia.org (last visited Oct. 11, 2006); City of New Orleans: Wireless Setup Information, http://www.cityofno.com/portal.aspx?portal=1&tabid=60 (last visited Oct. 11, 2006).

2000.[63] Nearly one-third of all Americans reportedly now receive news through the Internet regularly.[64]

The Internet unquestionably has attained greater prominence as a source of news and information, including at the local level, over the past several years.[65] The number of web pages indexed by Google is now estimated to have reached over 23 billion,[66] more than 5 times the number in 2004. [67] As Americans become more comfortable with and reliant on the Internet, they increasingly turn to it for information. Roughly 137 million adult Americans used the Internet in 2005, as opposed to under 60 million in 2000. On any given day, some 50 million Americans now turn to the Internet for news.[68] Nearly one-third of all Americans reportedly now receive news through the Internet regularly.[69]

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[63] Project for Excellence in Journalism, *The State of the News Media in 2006, An Annual Report on American Journalism* (2006), http://www.stateofthenewsmedia.org/2006/ (last visited Oct. 20, 2006).

[64] Pew Research Center for the People & the Press, News Consumption and Believability Study (July 30, 2006). By contrast, less than one-third of the American population regularly received news through the Internet in 2000. *Id*.

[65] *See, e.g.*, Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism, A Day in the Life of the Media* at 3 (2006), http://stateofhenewsmedia.org/2006/printable_daymedia_chapter.asp?media=1&cat=1; American Society of Newspaper Editors and Newspaper Association of America, *Growing Audience: Understanding the Media Landscape: Executive Summary* (2006) ("*ASNE/NAA Media Usage Study*"), http://www.growingaudience.com/downloads/GALandscapeExecSummary.pdf.

[66] *See* http://www.google.com/search?q=a (last visited Aug. 25, 2006).

[67] Google Corporate Information: Google Milestones, http://www.google.com/intl/en/corporate/history.html (last visited Oct. 20, 2006).

[68] Pew Internet & American Life Project, *Online News: For many home broadband users, the Internet is a primary news source*, at i (March 22, 2006) ("*Pew Internet Online News Study*")

[69] Pew Research Center for the People & the Press, News Consumption and Believability Study (July 30, 2006). By contrast, less than one-third of the American population regularly received news through the Internet in 2000. *Id*.

Thirty-six percent of Americans utilize the Internet for local news.[70] Many web sites now offer unique information about or perspectives concerning community issues. A growing number of sources cater to hyper-local (*e.g.*, neighborhood) civic issues. Highly localized websites, blogs and online citizen journalism have proliferated. Many Internet news sites permit users to aggregate information based on their own stated preferences (My Yahoo!) or the suggestions of a computer (Google News).

In addition to the vast number of independent web offerings, American consumers do turn to the websites of their local newspapers and television stations for news and information.[71] The Third Circuit discounted the distinct contributions of these outlets to the diversity of viewpoints in local markets because, the court said, they "merely republish the information already being reported by the newspaper or broadcast station counterpart."[72] Thus, according to the Third Circuit these outlets "do not present an 'independent' viewpoint and should not be considered as contributing diversity to local markets."[73]

To the contrary, the websites offered by traditional media companies like Gannett do far more than "merely republish" the content developed by their sister newspaper, radio, or television station.[74] Because of the immense capacity and unique attributes of

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[70] Harris Poll #35, HarrisInteractive Inc., Most Americans Who Are Online Use Internet for News, But Most Say This Does Not Reduce Their Use of Other News Media (May 19, 2004), http://www.harrisinteractive.com/harris_poll/index.asp?PID=464.

[71] *Pew Internet Online News Study*, *supra* footnote 58.

[72] *Prometheus*, 373 F.3d at 405-06.

[73] *Id.*

[74] *See, e.g.*, azcentral.com: Arizona's home page, http://www.azcentral.com/ (last visited Oct. 20, 2006); coloradoan.com: Bringing Fort Collins home, http://www.coloradoan.com/apps/pbcs.dll/frontpage (last visited Oct. 20, 2006); The Honolulu Advertiser Online,

the Internet, newspaper publishers and broadcasters greatly differentiate, supplement, and constantly update the information they disseminate to their audiences via the web. As opposed to reflecting whatever might be said to be the “viewpoint” of Gannett (or its newspapers or television stations, for that matter), Gannett’s websites serve as a platform for the espousal of an inordinate number of divergent viewpoints. These websites host chat rooms about top stories, forums on issues such as elections, public safety, immigration, schools, and even the neighborhood weather. Multiple blogs contain reporting, commentary, and observations on everything from local politics and sports to pop culture. Opinion pages offer venues for readers to state their views. In short, it would be factually incorrect and exceedingly shortsighted to conclude that the wealth of information disseminated by—and the speech-enhancing opportunities provided by—the online offerings of traditional media make no contribution to local diversity.

In sum, today’s consumers enjoy an abundance of media offerings and can choose to expose themselves to a wealth of diverse viewpoints. Significantly, there is no plausible argument that the Internet does not play a critical role in the dissemination of news and information to the American public, including <u>local</u> news and information, and contributes significantly to localism, competition, and diversity.

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http://www.honoluluadvertiser.com/apps/pbcs.dll/frontpage (last visited Oct. 20, 2006); The Statesman Journal Online, http://www.statesmanjournal.com/apps/pbcs.dll/frontpage; newsleader.com (last visited Oct. 20, 2006): Serving the central Shenandoah Valley, http://www.newsleader.com/apps/pbcs.dll/frontpage (last visited Oct. 20, 2006); The Springfield News-Leader Online, http://www.news-leader.com/apps/pbcs.dll/frontpage (last visited Oct. 20, 2006). For additional links to Gannett newspaper websites offering unique local content, community forums, user commentary, and other hyper-local features, see Gannett Newspapers on the Web, at http://www.gannett.com/web/newspapers.htm (last visited Oct. 20, 2006).

2. The Role of the Traditional Media Has Changed

Given the rapid and dynamic changes in the media marketplace, it should come as no surprise that daily newspapers and local television stations are struggling to keep pace. The newspaper industry has wrestled for years with declining circulation and rising competition for advertising. Newspaper circulation declined at a rate of one percent each year between 1990 and 2004.[75] These losses accelerated in 2005 and are accelerating further in 2006.[76] In the first three quarters of 2006, spending on newspaper print advertising increased by a modest 0.3 percent over the corresponding period in 2005, while spending for online advertising surged by 35 percent.[77] Merrill Lynch has cut its newspaper-ad revenue forecast for this year to flat from 1.2% growth and revised its 2007 forecast to a drop of 1.5%.[78]

In 2005, newspaper stocks fell an average of 20 percent.[79] The recent forced sale of America's second largest newspaper chain, Knight Ridder, indicates that investors and analysts have grown wary of newspaper performance. Third quarter 2006 earnings reports from three major newspaper companies—Tribune Co., New York Times Co., and Belo Corp.—provided more arresting evidence that print-advertising revenues have gone

[75] Pew Charitable Trusts, *State of the News Media 2004 Fact Sheets: Newspapers* (March 2004).

[76] Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism, Newspapers* (2006).

[77] Julie Bosman, "*Online Newspaper Ads Gaining Ground on Print*, " The New York Times, June 6, 2006, at C1; *see also* Internet Advertising Bureau, Press Release, "*Internet Advertising Revenues Close to $4 Billion for Q1 2006, Continues Trend of Record Setting Quarters*" (May 30, 2006) (reporting 38 percent increase in Internet advertising revenues in first quarter of 2006 over first quarter in 2005).

[78] Sarah Ellison, *Ad Woes Worsen at Big Newspapers: New York Times, Tribune, Belo Post Revenue Declines After Extended Weakness*, Wall St. J., Oct. 20, 2006, at B4.

[79] *See, e.g.*, Pete Carey, "*Knight Ridder Sold to McClatchy*," The Mercury News, Mar. 13, 2006, *available at* http://www.mercurynews.com/mld/mercurynews/14084153.htm (last visited Oct. 20, 2006).

into decline, and stock prices correspondingly have suffered.[80] Indeed, faced with declining profits and circulation, the Tribune Company has been embroiled in a public struggle with key shareholders over the future of the company.[81] Even the *New York Times* has not been immune to these trends. Its share price has fallen by nearly half in the past four years, and it has announced plans to sell its television stations.[82]

Many newspapers have cut newsroom resources. Because the operational costs associated with newspaper printing and circulation are relatively inflexible, publishers often must turn to newsgathering expenditures in order to significantly reduce costs. In 2006, the industry was expected to lose between 1,500 and 2,000 newsroom professionals, resulting in a 7 percent loss since 2000.[83]

Traditional broadcast media also have experienced notable downward trends. Network television, for half a century the unquestioned leader in media profitability and viewership, is wrestling with the same challenges facing newspaper and other traditional media. Nielsen ratings for the three nightly newscasts on network television have declined by one third in the last decade.[84] NBC Universal recently announced sweeping

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[80] Tribune reported a 2% drop in publishing ad revenue. The New York Times reported a 4.2% drop in ad revenue. Belo, which publishes the Dallas Morning News and the Providence Journal, said ad revenue for its newspaper group fell 5.5%. Sarah Ellison, *Ad Woes Worsen at Big Newspapers: New York Times, Tribune, Belo Post Revenue Declines After Extended Weakness*, Wall St. J., Oct. 20, 2006, at B4. Gannett's third quarter 2006 earnings per diluted share were $1.11 compared with $1.13 per share in the third quarter of 2005.

[81] *See, e.g.*, Michael Oneal, "*Weaker Earnings Keep Heat on Tribune*," Chicago Tribune, July 14, 2006, at C1; Frank Ahrens, "*Tribune Empire Could Crumble*," Wash. Post, Sept. 26, 2006, at D1.

[82] "*Who Killed the Newspaper?*," The Economist, at 9 (Aug. 26, 2006).

[83] Project for Excellence in Journalism, *State of the News Media 2006: An Annual Report on American Journalism, News Investment* (2006), http://www.stateofthenewsmedia.org/2006/.

[84] Pew Charitable Trusts, *State of the News Media 2004 Fact Sheets: Network TV* (March 2004).

cuts to its television operation.[85] Young people are now nearly as likely to say that they get their political news from comedy TV shows, like the "Daily Show with Jon Stewart," as they are from network news.[86]

Although local television stations generally have remained profitable, viewership has declined in recent years.[87] The number of hours the average person spends watching broadcast television on an annual basis declined by 15 percent in the past decade.[88] As of 2004, viewership of local early evening newscasts and late newscasts had dropped by 18 percent and 16 percent, respectively, since 1997.[89] The rise of cable networks has eaten into their ratings, and now the Internet, along with other information and entertainment

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[85] Frank Ahrens, *NBC Taking Big Step Back From Television: Old Media Undergoes a Digital Makeover*, Wash. Post, Oct. 20, 2006, at A1. NBC News President Steve Capus is quoted as saying, "We've been a TV business that dabbles in digital. Now, we're positioning as a news content-production center going forward that happens to do television." *Id.*

[86] The Pew Research Center for the People and the Press, *Cable and Internet Loom Large in Fragmented Political News Universe* (Jan. 11, 2004) (showing that among 18-29 year olds, 23 percent learn about politics from network news, 23 percent from daily newspapers, and 21 percent from comedy TV shows).

[87] The New York Times Company also recently announced the sale of its nine television stations. See Katharine Q. Seelye, "*Times Company Puts Its Nine Television Stations Up for Sale*," The N.Y. Times, Sept. 13, 2006, at C2. Industry observers have noted that the sale "suggest[s] a concern about the future profitability of local stations during a tumultuous time for media companies, as the Internet siphons consumers and advertisers from both print and television." *Id*.

[88] *ASNE/NAA Media Usage Study* at 3.

[89] Pew Charitable Trusts, *State of the News Media 2004 Fact Sheets: Local TV* (March 2004). Similarly, a 2006 study by The Pew Research Center For The People & The Press concluded that "[b]roadcast news outlets continue to struggle—over the last two years alone, the audiences for nightly network, local TV news and radio news have all slipped." The Pew Research Center For The People & The Press, *Maturing Internet News Audience—Broader Than Deep: Online Papers Modestly Boost Newspaper Readership, Pew Research Center Biennial News Consumption Survey* at 1 (July 30, 2006).

options, is doing the same.[90] Many TV stations have cut back, or eliminated entirely, their news operations.[91]

It is readily apparent that as the marketplace has evolved, traditional media have become increasingly less dominant. The days when consumers were required to watch the evening news or open their daily newspaper to become informed are long gone. Americans can now choose from a myriad of outlets for news and information, including national newspapers, cable news channels, major commercial broadcast networks, websites, blogs, radio, local newspapers, magazines and other non-daily publications, broadcast stations, and ethnic and alternative media.[92] And they are doing so—substituting new media for old, increasing the amount of time devoted to media overall, and using more than one medium at a time.[93]

It is against this background—one where an increasingly splintered marketplace provides abundant viewpoint diversity—that the Commission must respond to the directives of the Third Circuit and its mandate under Section 202(h). The challenges facing traditional newspapers and broadcasters have become even more acute than they were 2003. The old model of doing business is no longer viable. Television's multiple channel digital offerings consisting of locally-oriented programming and local newspaper

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[90] *See* Section III B., *infra*.

[91] Among the many examples are ABC affiliate WWTI in Watertown, New York; Fox affiliate WYSM in Lansing, Michigan; CBS affiliate WIAT in Birmingham, Alabama; Fox affiliate WUHF in Rochester, New York, and ABC affiliate WVNY in Burlington, Vermont. *See* note 149, *infra*.

[92] Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism, A Day in the Life of the Media* at 3 (2006).

[93] Center for Media Design, Ball State University, *Middletown Media Studies: The Media Day* at 8 (Fall 2005). In describing these trends, the study notes that overall daily use of media has increased by 30 minutes since 1999. *Id*. (*citing* Veronis Suhler Stevenson (2005)).

reporters shooting and editing video for display on the paper's website are becoming the norm. In this digital era, as readers and viewers migrate away from older channels of distribution to new ones, media companies must quickly adjust to and anticipate change. The newspaper/broadcast cross-ownership ban serves only to hinder the ability of quality news organizations to distribute the information they gather consistent with the needs of their audiences—anytime, anywhere, in any form. Denying newspaper publishers and free, over-the-air broadcasters the economic and operational efficiencies associated with common ownership is unnecessarily hampering their ability to compete, to the detriment of the American public. The case for repeal of the newspaper/broadcast cross-ownership ban has never been more compelling.

3. Existing Newspaper/Broadcast Combinations, Including Gannett's Phoenix Combination, Continue To Produce Significant Public Interest Benefits Without Countervailing Detriment

In upholding the Commission's determination to eliminate the blanket ban on newspaper/broadcast cross-ownership, the Third Circuit found that the Commission properly relied on record evidence that "existing (grandfathered) newspaper-owned broadcast stations produced local news in higher quantity and with better quality than other stations."[94] Moreover, the court upheld the conclusion that a blanket prohibition is not necessary to ensure diversity in local markets because the evidence did not establish that commonly owned outlets "necessarily speak with a single, monolithic voice."[95]

These determinations were based on concrete evidence from Gannett and similarly situated newspaper/broadcast owners in markets of varying sizes, demonstrating

[94] *Prometheus*, 373 F.3d at 398.

[95] *Id.* at 399.

the societal benefits of permitting local news outlets to invest in innovative journalistic endeavors and describing the autonomy of their local operations. The myth that cross-ownership of a newspaper and television station translates into common "slant" has been dispelled. Joint ownership of newspapers and broadcast outlets continues to enhance news and public affairs programming, particularly <u>local</u> news and public affairs programming.

Over the past six years, Gannett has integrated the operations of KPNX-TV, *The Arizona Republic*, and azcentral.com such that each media outlet effectively utilizes the resources of the others to better serve the marketplace. [96] Gannett melds the complementary strengths of print, broadcast, and online media to expand the volume of news and information communicated to Phoenix residents and to improve the quality of its offerings, particularly local news, public affairs programming, and community service.[97] Most importantly, while taking full advantage of the synergies that flow from convergence, Gannett's Phoenix outlets have maintained separate editorial voices, thus adding to the diversity of the market.

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[96] Gannett has documented the public interest benefits attained through the shared resources of its Phoenix properties in numerous comments filed with the Commission in proceedings re-examining the newspaper-broadcast cross-ownership rule. *See, e.g.*, Comments filed by Gannett Co., Inc. in *2002 Biennial Regulatory Review-Review of the Comm'n's Broad. Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets-Definition of Radio Markets*, Notice of Proposed Rulemaking, 17 FCC Rcd 18,503 (2002) (MB Docket No. 02-277 established Sept. 2002); Gannett Co., Inc. Waiver Request (filed May 31,2006), appended as Attachment 14 to APPLICATION FOR RENEWAL OF BROADCAST STATION LICENSE, FCC Form 303-S, http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=407172.

[97] Because of the efficiencies and considerable resources associated with common ownership, Gannett is also able to respond quickly to market demands, most recently by expanding service to the region's burgeoning Latino population. KPNX-TV broadcasts daily in Spanish on "12 News En Español" on its Separate Audio Program ("SAP") channel, and Gannett now publishes La Voz, an award-winning Latino weekly newspaper, as well as the Latino news web site lavoz.azcentral.com.

The television and newspaper have had numerous opportunities to experiment with convergence to assess what collaborations work to enhance the quality of the news and information that each separately provides. For example, *Arizona Republic* staffers appear on the television station's programs and contribute to news coverage that focuses on important community issues and provides a wide mix of opinions.[98] KPNX-TV exchanges video with *The Arizona Republic*, which contributes still photography, allowing both platforms to supplement their existing visual material. Each outlet makes its archived material available to the other. Combined efficiencies have enabled KPNX-TV to expand the local programming it offers to Phoenix viewers. New programs include a weekday 4:30 pm newscast and a weekly travel and tourism program titled "Arizona Highways." Public response has been overwhelmingly positive, and KPNX-TV has been recognized for its high quality journalism.[99]

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[98] Examples of these efforts include: "Sunday Square Off," a weekly Sunday political talk show that features editorial page columnists from *The Arizona Republic*; an *Arizona Republic* high school sports beat writer contributes as a reporter to "Friday Night Fever," a weekly high school football program; and KPNX-TV sports and entertainment coverage, which calls on *Arizona Republic* reporters for contributions. For example, members of *The Arizona Republic* sports staff appeared regularly on the station's 2000, 2002, 2004, and 2006 Summer Olympics reports.

[99] KPNX-TV boasts the top-rated 10 PM newscast in Phoenix, with a 7.5 rating and 13 share, and top-rated weekend newscasts. KPNX-TV also has the market's leading 6 PM newscast, "Arizona Nightly News." Moreover, since Gannett acquired *The Arizona Republic* KPNX-TV has received an extraordinary share of regional and local journalism awards. Recently, "Best of the West" honored KPNX-TV with a first-place award in the Spot News category for its coverage of Martin Luther King Day celebration disturbances. The station also won the top prize in the "Immigration and Minority Affairs Reporting" category. Over the past six years, KPNX-TV and its staff members also have received: recognition as the city's top television station for seven years in a row by *Ranking Arizona Magazine*; three Emmys in 2003 for spot news coverage, service stories, and best weathercast; for its coverage of the 2002 Rodeo-Chediski wildfire, the NATAS Governor's Award for service, the National Association of Hispanic Journalists Spot News Award, and recognition from the Salvation Army; the Media Award of the Governor's Council on Health, Physical Fitness and Sports for its 2004 Health Challenge Project (a collaboration with The *Arizona Republic*'s "Arizona Living" section); Arizona State University's Media Award for Excellence in Public Education Reporting; the regional Edward R. Murrow Award for writing; and a 2005 Emmy for stories told on deadline.

One significant advantage that *The Arizona Republic* gains from its collaboration with KPNX-TV is its ability to focus on the traditional strengths of print journalism. In the current newsgathering climate, most newspaper journalists must write for two mediums—print and online. According to some journalism observers, this form of convergence forces some journalists to forsake length for timeliness, depth for immediacy, and accuracy for speed.[100] Although both *The Arizona Republic* and KPNX-TV cover breaking news for azcentral.com,[101] the newspaper's reporting staff has been restructured to retain certain reporters and editors who concentrate on deeper, investigative pieces and full-length features, to the benefit of the local community. The paper now publishes "special investigative or enterprise reports" nearly every month. Recent topics have ranged from immigration to drought and water use. *The Arizona Republic*'s increasingly in-depth news coverage has led to national recognition and critical acclaim for its high-quality journalism.[102]

Gannett has integrated the online operations of *The Arizona Republic* and KPNX-TV into azcentral.com. Far from "merely republishing" what is in the newspaper and on

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[100] *See, e.g.*, Edward Wasserman, *Is 'convergence' the next media disaster?*, The Miami Herald, May 15, 2006, *available at* http://www.miami.com/mld/miamiherald/news/opinion/14581081.htm.

[101] Editors of *The Arizona Republic* consult with KPNX-TV editors about their respective coverage of breaking stories. They also convene to discuss each other's special projects in order to time coverage for maximum exposure.

[102] Two members of *The Arizona Republic*'s staff recently were named Pulitzer Prize finalists. *The Arizona Republic* also won awards from the Associated Press Sports Editors and from the Society of American Business Editors. Locally, the paper has been recognized by "Best of the West," the State Associated Press Managing Editors, the State Press Club, the Valley of the Sun United Way, and the American Red Cross. *The Arizona* Republic has also earned Gannett corporate awards for its excellence in news gathering and reporting. In April, Ward Bushee, Editor and Vice President/News, was named Gannett's 2005 Editor of the Year award, the company's top individual journalistic honor. In the same year, Gannett bestowed *The Arizona Republic* with its Outstanding Achievement Award for Best News Performance by a Newspaper, the organization's highest print award. In 2004, the paper was named one of Gannett's five Gold Medal newspapers for journalistic excellence and was a finalist for the Freedom of Information Award.

local TV news, this web site combines articles from *The Arizona Republic* with video and breaking news updates from KPNX-TV and has become a valuable local news source for Phoenix residents in its own right. *The Arizona Republic* provides most of the site's written news coverage, KPNX-TV provides the majority of the video, and *La Voz* contributes Spanish-language articles. The site's special coverage of immigration rallies last spring drew heavily from material prepared by *The Arizona Republic*, while at the same time featuring streaming video from KPNX-TV. When 120,000 people marched to the Arizona Capitol in April 2006 for the largest protest in Arizona history, KPNX-TV delivered six hours of live streaming coverage to azcentral.com. The webcast attracted over 70,000 viewers. A three-minute online video news segment, updated several times a day by KPNX-TV, was downloaded over 9,000 times. The web site also featured a live blog, prepared while a reporter walked with marchers, which attracted over 1,700 views. The public's response strongly suggests that consumers desire real-time updates, factual details, and supporting video. Coverage of the event is emblematic of how common ownership offers Gannett's Phoenix outlets the additional resources and flexibility to deliver a higher quantity and quality of local news and information to consumers.

Gannett's experience in Phoenix unequivocally substantiates the conclusions about newspaper/broadcast cross-ownership articulated by the Commission in the *2002 Biennial Review Order* and affirmed by the Third Circuit. Across the board, Gannett's convergence efforts have led to better journalism, increased localism, and enhanced public service for each of its Phoenix media outlets. At the same time, these media maintain separate editorial voices, thus enhancing, rather than diminishing, the diversity of the market.

In a study relied upon by the Commission in its *2002 Biennial Review Order*, David Pritchard of the University of Wisconsin-Milwaukee found that, among ten newspaper/broadcast combinations in place at that time, KPNX-TV and *The Arizona Republic* had the most divergent viewpoints:[103]

> In five of the newspaper-television combinations . . . , the overall slant of the newspaper coverage was noticeably different from the overall slant of the coverage of the television owned by the same company. Nowhere was this tendency more apparent than in Gannett's Phoenix properties. The slant of 192 items from *The Arizona Republic* (which endorsed Bush) was –4.69, fairly close to neutrality. The slant of the 23 items from KPNX-TV, however, was –30.43, the strongest pro-Gore slant coefficient in the study.[104]

Since the 2000 election, *The Arizona Republic* has not moved any farther away from the center. In 2004, when 36 newspapers that had supported Bush in 2000 endorsed Senator John Kerry for president, *The Arizona Republic* endorsed Bush.

The respective staffs at KPNX-TV and *The Arizona Republic* are given the freedom to choose their own news and informational content for each media outlet. The staffs have always been fully autonomous, but they have become even more so recently because they have a better sense of where collaboration works and where it does not. In some instances, the publications' independence from each other has resulted in controversy between the two newsrooms. On September 5, 2006, *The Arizona Republic* sparked the ire of sister station KPNX-TV, an NBC affiliate, when the newspaper prominently featured, on the front page—above the fold—talent from the station's ABC and CBS-affiliated competitors (*see* Attachment A).

[103] David Pritchard, Federal Communications Commission Media Ownership Working Group, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign (September 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf.

[104] *Id.*

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The societal benefits of commonly owned local news outlets pooling resources and investing in innovations outweigh the unproven potential harm of newspaper/broadcast cross-ownership. Gannett's common ownership of a television station, a newspaper, and a web site in Phoenix has allowed diverse platforms to cross-pollinate and share resources. For Phoenix viewers, readers, and Internet users, this convergence has translated to news when, where, and how they want it, and has improved the journalism, particularly the local coverage, of all the properties. As with newspaper/broadcast combinations in markets across the country, Gannett's media outlets in Phoenix successfully make their end product more interesting, more informative, more diverse, and better oriented to local readers and viewers. Conversely, there has been no harm to the Commission's stated interest in preserving diversity of viewpoint.

C. <u>The FCC Should Repeal the Newspaper/Broadcast Cross-Ownership Ban Based on the Availability of Local News and Information Options in Today's Media Marketplace</u>

As discussed above, the only question that the Commission must address in this proceeding is whether *any* restrictions on cross-ownership remain necessary in the public interest to preserve local viewpoint diversity. The record before the agency when it launched this proceeding was more than adequate to answer this question in the negative. In today's environment, the response is unambiguously clear.

As Chief Judge Scirica observed in his dissenting opinion in *Prometheus*, "[p]reserving the 'marketplace of ideas' does not easily lend itself to mathematical certitude."[105] In comparison to "other independent federal agencies" that "may act with

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[105] *Prometheus*, 373 F.3d at 436.

greater measurable precision in reducing pollution emissions, defining safety standards or even establishing interest rates, the FCC operates in the less scientific arena of speech and debate."[106] The Commission similarly concluded that measuring diversity is "as much art as science."[107] "Diversity is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations."[108]

These observations ring truer now that several years have passed since the Commission last considered the cross-ownership ban. The most logical way to approach the limited question regarding newspaper/broadcast cross-ownership is to analyze the number of sources of local news and information available in the current media marketplace. At bottom, what matters is whether local audiences have an adequate variety of local news and informational choices at their disposal; the relative popularity of one outlet versus another should be irrelevant.

In fact, the concept of "weighting" media outlets is antithetical to the precept of viewpoint diversity. As the Commission itself explained in its *2002 Biennial Review Order*, "viewpoint diversity refers to the *availability* of media content reflecting a variety of perspectives."[109] It does not, at its core, concern the "market share" held by any one

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[106] *Id*.

[107] *2002 Biennial Review Order*, 18 FCC Rcd at 13,793 (¶ 441).

[108] *Id.*

[109] *2002 Biennial Review Order*,18 FCC Rcd at 13,627 (¶ 19) (emphasis added); *see also id*. at 13,776 (¶ 393) ("Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues."); *id*. at 13,777 (¶ 394) ("Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e*., people generally have access to only media available in their home market.").

market participant.[110] In other words, it matters not if one voice speaks "louder" than another for purposes of assessing the diversity of viewpoints available in a local community—it matters only that different voices have the means through which to speak, and can be heard by any who choose to listen. The Commission, therefore, should eschew suggestions that it enter the thicket of trying to determine which "voices" are "more important."

Moreover, the amount of time that consumers may spend with any one news outlet does not necessarily correspond to the relative importance of that medium as a source of local news and information. While some consumers may spend several hours in a typical day with local television or radio news on in the background, a relatively short amount of focused time spent reading a local news article in print or online may prove a more fruitful endeavor. Even if one news outlet has a larger overall audience share than another, one cannot conclude with any certainty that this outlet is relatively more important to viewpoint diversity than another.

By analyzing diversity based on audience reach or market share instead of availability, the Commission would improperly discount the critical role that less popular media outlets often perform in local markets. As the Commission has acknowledged, alternative media can serve as critical watch-dogs with respect to the major media outlets.[111] The importance that alternative media, which typically have a smaller

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[110]The Commission expressly recognized that availability, rather than market share, is the key to its diversity analysis in justifying its decision to include the Internet in the Diversity Index: "We include the Internet [in the Diversity Index] because, as previously indicated, we are looking at availability of media, not the popularity of specific publications, stations, cable channels, or websites." *Id.* at 13,789 (¶ 427).

[111] *See id.* at 13,779 (¶ 401). Real-life examples of this phenomenon include local media watchdog blogs, such as Save Richmond, http://www.saverichmond.com/, which won the 2005 Laurence E. Richardson Freedom of Information Award, for its investigation of funding problems with the Virginia Performing Arts Center, an issue that local Richmond media had declined to tackle. *See* Conaway Haskins, Editorial,

audience than traditional outlets, have in the marketplace for ideas in this respect would not be captured by a market-share based diversity analysis.

The current reality is that the media marketplace has evolved to the point that consumers in every market would continue to have access to a wealth of diverse sources of local news and information if the Commission completely eliminated its local media ownership rules. Consistent with its mandate under Section 202(h), then, the Commission should repeal the newspaper/broadcast cross-ownership ban.[112]

III. <u>THE COMMISSION SHOULD RELAX THE LOCAL TELEVISION OWNERSHIP RULE</u>

For similar reasons, the Commission should liberalize the local television ownership, or "duopoly," rule. Given the characteristics of the modern information marketplace described above, the existing duopoly rule cannot be shown to achieve the Commission's objectives of diversity, competition and localism. To the contrary, elimination of unnecessary constraints on television broadcasters' ability to combine operations will make possible operating efficiencies that can translate into enhanced news and information.

"*Who's Watching the Richmond Media?*," Bacon's Rebellion, (Sept. 13, 2006), *available at* http://www.baconsrebellion.com/Issues06/09-25/Haskins2.php. Other blogs and websites which serve a similar role as watchdogs of local news coverage include Grade the News, http://www.gradethenews.org/ (last visited Oct. 20, 2006) (evaluating print and broadcast news in the S.F.an Francisco Bay Area), Boise Guardian, http://www.boiseguardian.com/ (last visited Oct. 20, 2006) (a watchdog blog for local media and politics in Boise, IdahoD), Ron Fineman's On the Record, http://ronfineman.com/ (last visited Oct. 20, 2006) (a subscription-based website that critiques TV news coverage in the Los Angeles area), the blog of Ronald Wesley Maly, http://www.rmaly.blogspot.com/ (last visited Oct. 20, 2006) (a blog that acts as a watchdog of the *Des Moines Register*), and Colorado Media Matters, http://colorado.mediamatters.org/ (last visited Oct. 20, 2006) (a state-based project of the national Media Matters, a progressive news watchdog that monitors news outlets for "conservative misinformation").

[112] As discussed in Section III.B, *infra*, proposed newspaper/broadcast combinations would remain subject to the merger review processes of the DOJ and the FTC, whether under the Hart-Scott-Rodino Act or pursuant to the agencies' general Clayton Act authority. This review process sufficiently protects against any isolated danger to competition in specific local markets.

A. <u>The Third Circuit Upheld the Commission's Fundamental Determinations With Regard to Local Television Ownership</u>

As with the newspaper/broadcast cross-ownership ban, the Commission's review of the local television ownership rule should be a limited one.[113] In the *2002 Biennial Review Order*, the Commission acknowledged the explosion of competition in the media marketplace that had occurred since passage of the 1996 Act and found that these developments compelled it to take at least some steps to relax the local television ownership rule.[114] Accordingly, the agency modified the rule to allow duopolies in markets with seventeen or fewer television stations and to allow ownership of three stations in markets with eighteen or more television stations, provided that no more than one of the top four ranked stations in a market was acquired by a single owner.[115]

Because the rule changes adopted in 2003 have yet to go into effect as a result of the stay left in place by the Third Circuit,[116] there has been *no* alteration of the local television ownership rule since 1999 and only marginal relaxation since the 1960s. The Commission already has concluded that the existing rule is no longer in the public interest and actually may stifle competition and act as a detriment to consumers who want

[113] *NPRM* at ¶¶ 18, 33.

[114] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,647-67 (¶¶ 86-128).

[115] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,668-711 (¶¶ 132-233).

[116] *See Prometheus*, 373 F.3d at 435. The Third Circuit initially stayed all of the rule changes but later, in response to a request from the FCC, allowed certain restrictive revisions to the local radio ownership rules to take effect. *See Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004).

local, diverse television programming.[117] These conclusions were generally affirmed by the Court of Appeals.[118]

The Third Circuit expressly agreed that "[c]onsolidation" among local television stations "can promote local programming."[119] In the *2002 Biennial Review Order*, the Commission found that the local television ownership rule is not necessary to promote localism and that allowing greater levels of common ownership would in fact *advance* its localism goal.[120] Specifically, the Commission concluded that the evidence suggested "that owners/operators of same-market combinations have the ability and incentive to offer *more* programming responsive to the needs and interests of their communities and that, in many cases, that is what they do."[121] The agency found that empirical evidence in the record demonstrated "that stations that are commonly owned or operated are more likely to offer local news than independently owned stations."[122] As the Commission recognized, the rising costs of producing news and public affairs programming, combined with the competitive challenges that broadcasters are facing as a result of the proliferation of news and information sources in today's media marketplace, create the risk that broadcasters will reduce or even halt local news operations.[123] In fact, many have done

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[117] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,668 (¶ 133), 13,685-86 (¶¶ 169, 171); *NPRM* at ¶ 12.

[118] *Prometheus*, 373 F.3d at 415.

[119] *Id.*; *see also id.* at 415-16.

[120] *2002 Biennial Review Order*, 18 FCC Rcd at 13,668 (¶ 133), 13,686 (¶ 171).

[121] *Id.* at 13,683 (¶ 164) (emphasis added); *see id.* at 13,678-83 (¶¶ 157-64).

[122] *Id.* at 13,679 (¶ 159).

[123] *See id.* at 13,684, 13,685 (¶¶ 166, 169).

so.[124] The Court of Appeals underscored that "local ownership combinations were likely to yield efficiencies that 'can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest.'"[125]

Likewise, the Third Circuit expressly "agree[d] with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets."[126] In the *2002 Biennial Review Order*, and in response to the D.C. Circuit's directive in *Sinclair*[127], the Commission considered whether non-broadcast media should be taken into account in analyzing diversity, and properly concluded that "media other than television broadcast stations contribute to viewpoint diversity in local markets."[128] Notably, the Commission acknowledged that "a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting *more* perspectives than do multiple owners of single outlets."[129] The Commission also found that "the majority of markets have an abundance of viewpoint diversity," and therefore concluded that the local television ownership rule was "not necessary to achieve its diversity goal."[130]

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[124] *See* note 149, *infra*.

[125] *Id.* at 415 n.45 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13,678 (¶ 155) (in turn, citing *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12,903, __ (¶ 34) (1999))).

[126] *Prometheus*, 373 F.3d at 414-15.

[127] *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

[128] *2002 Biennial Review Order*, 18 FCC Rcd at 13,686 (¶ 171).

[129] *Id.* at 13,687 (¶ 174).

[130] *Id.* The FCC also concluded that the rule was not necessary to further so-called program diversity. *See id.*

Finally, the Commission found that the local television ownership rule was "not necessary to protect competition."[131] The agency concluded that "the programming choices offered by local broadcast television stations and cable networks represent good substitutes" for each other,[132] and that the efficiencies associated with common ownership of television stations in local markets tends to improve audience ratings, demonstrating an increase in overall consumer welfare as a result of joint ownership.[133] Relaxation of the local television ownership rule, the Commission found, would "facilitate efficiencies and likely result in the delivery of programming preferred by viewers."[134] With respect to the video advertising, the agency found that common ownership of two local stations has produced efficiencies without facilitating the exercise of market power.[135] No party specifically challenged this aspect of the Commission's ruling on appeal, and the Third Circuit did not disturb it.[136] Primarily because of flaws it found with the Commission's "equal market share approach," however, the Third Circuit remanded for further consideration the numerical limits applicable to same-market TV station combinations.[137]

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[131] *2002 Biennial Review Order*, 18 FCC Rcd at 13,671 (¶ 140).

[132] *Id.* at 13,673 (¶ 143).

[133] *See id.* at 13,675 (¶ 150).

[134] *Id.*

[135] *See id.* at 13,675, 13,677 (¶¶ 151, 153).

[136] *See Prometheus*, 373 F.3d at 415-18.

[137] *See id.* at 418-20; *NPRM* at ¶ 16.

Thus, the Commission need not start from square one to determine whether or not it should relax the local television ownership rule as it determined to do in 2003.[138] The Commission is simply charged with revising its ownership limits to account for the recommendations of the *Prometheus* court and, consistent with its mandate under Section 202(h), to update the rule to reflect changes in the media marketplace since the *2002 Biennial Review Order*.[139]

B. <u>Existing Constraints on Local Television Combinations Artificially Disadvantage Broadcasters in Small and Medium Markets</u>

Given the record before it, the Commission's measured 2003 decision to relax the television duopoly rule in the nation's largest markets was a step in the right direction. In the current proceeding, it is incumbent upon the Commission to consider current marketplace realities, and to evaluate whether the unique dynamics of local television broadcasting suggest that "bottom up" rather than "top down" deregulation might better serve the public interest.

As a preliminary matter, the sheer number of media outlets available today guarantees that consumers and advertisers reap the benefits of a vibrantly competitive landscape. The number of outlets in all media markets is such that no single entity is likely to gain an anticompetitive advantage that could result in harm to consumers, or is even remotely able to monopolize debate.

Meanwhile, the challenges facing free, over-the-air television broadcasting are significant. The myriad choices available to today's consumers have resulted in a steady

[138] *See NPRM* at ¶¶ 18-19 (inviting comment only on the matters remanded to the Commission by the *Prometheus* court and requesting consideration and discussion of whether those comments accord with the court's ruling in *Sinclair*).

[139] The Commission has already recognized that the current review of the local television ownership rule, should be a limited one. *See NPRM* at ¶ 33.

migration away from television broadcast viewing and a concomitant drop in television advertising revenue. Indeed, the Commission itself has observed that television broadcasters, in particular, have suffered in recent years: "[B]roadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of broadcast networks continue to grow."[140] The number of television viewers who rely solely on broadcasting has continued to decrease, dropping from about 16.2 percent of television households in 2000 to 14 percent in 2005.[141]

At the same time, cable revenue from local advertising has experienced staggering growth, increasing 536 percent between 1992 and 2006, and growing more than 40 percent just since the release of the *2002 Biennial Review Order*.[142] Internet companies are also thriving; the combined valuation of Google and Yahoo, for example, is more than that of *the top 22* local television, radio, and newspaper companies combined.[143] Internet advertising has also witnessed a dramatic influx of advertising revenue. In the first half of 2006, over $7.9 billion was spent in the United States on Internet advertising, an increase of over 37 percent compared to the first half of 2005.[144] Projections have

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[140] *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2550 (¶ 93).

[141] *Id.* at 2508 (¶ 17).

[142] *See* NCTA, Cable Advertising Revenue: 1985-2006, http://www.ncta.com/ContentView.aspx?contentId=70 (last visited Oct. 12, 2006).

[143] *See* Victor B. Miller IV, Bear Stearns & Co., *Radio: A Crude Recovery?* (Sept. 20, 2006), at 16 (presented at the NAB Radio Show 2006).

[144] Jason Lee Miller, *Internet Advertising Spend Booms Again*, webpronews.com (Sept. 26, 2006), *at* http://www.webpronews.com/topnews/topnews/wpn-60-20060926InternetAdvertisingSpendBoomsAgain.html

indicated that monies spent for localized Internet advertising could increase by nearly 31.6 percent next year, to $7.7 billion.[145]

This growth in the popularity of alternatives to terrestrial broadcasting results in the diversion of investment capital from traditional media to new platforms such as the Internet, only compounding the harm to broadcasters and the viewing public.[146] In light of the ever-increasing competition faced by television broadcasters, a continuation of the regulatory status quo serves only to constrain the full competitive potential of free, over-the-air broadcast stations that face major and growing challenges in today's market.

Even in smaller markets, the number of media outlets available—including local media outlets—is overwhelming.[147] The challenges faced by broadcasters in mid-sized and small markets, however, are particularly acute. Many of the costs of operating a television station are fixed costs—such as, for example, news production, power costs, DTV tower construction, and equipment costs——so that operating a small market station is *not* less expensive than a larger market station. Further, the price differential between local television advertising spots and other means of reaching local consumers—for example, cable television and radio spots, local newspaper ads, direct mail and other local print vehicles, and ads on locally oriented web sites—typically is lower in smaller

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[145] Toni Fitzgerald, *The Big Web Trend: Smaller Advertisers*, Media Life Magazine Online (Oct. 2, 2006), *at* http://www.medialifemagazine.com/artman/publish/article_7655.asp.

[146] *See, e.g.*, Frank Ahrens, *Tribune Empire Could Crumble*, Wash. Post, Sept. 26, 2006, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/25/AR2006092501367.html (arguing that one of the problems causing troubles at Tribune is the drastic shift in advertising spending from traditional media to the Internet); *Softness in Print Advertising Hits New York Times, Tribune*, Wall Street J. Online (Oct. 19, 2006), http://online.wsj.com/article/SB116126371519497657-search.html?KEYWORDS=internet+advertising&COLLECTION=wsjie/6month; Rebecca Buckman, *Start-ups Hope Web Ad Boom Spreads Wealth*, Wall Street J., Oct. 17, 2006, at B1.

[147] *See* Section II.B, *supra*.

markets than in large markets, which suggests that broadcast television may face particularly spirited competition from a broader array of alternative media in those smaller markets.

The fact is that the duopoly rule artificially disadvantages television operators in small and medium markets. The expansion of competitive media outlets is not limited to America's larger markets. Indeed, the Commission recognized in the *2002 Biennial Review Order* that mid-sized and small market stations have been particularly hard hit in recent years, concluding that "the ability of local stations to compete successfully in the delivered video market [has been] meaningfully (and negatively) affected," particularly "in mid-sized and smaller markets."[148]

As demonstrated above, sufficient levels of viewpoint diversity are more than guaranteed by the ever-expanding number of media options from which consumers are able to choose. Again, whether or not all participants in the vibrantly competitive local media markets that now exist have equal market shares is not determinative of whether or not sufficient viewpoint diversity exists; the point is that today there are outlets available to American consumers that espouse every possible viewpoint and address every possible niche interest, rendering arbitrary restrictions on local ownership of some types of media entirely unnecessary.

Further, the reality is that restrictions on local television ownership actually *harm* both viewpoint diversity and programming diversity. By denying television broadcasters the benefits of the efficiencies and synergies of common ownership, an artificial limit on the number of stations that can be owned *decreases* overall diversity levels. Because of

[148] *2002 Biennial Review Order*, 18 FCC Rcd at 13,698 (¶ 201).

the competitive pressures placed on terrestrial television broadcasters by other providers of news, informational, and video entertainment programming, and the rising costs of producing and airing the types of news and informational programming that most often communicate viewpoints (*e.g.*, local news and public affairs shows), some broadcasters are being forced to cut back the production of such programming or to discontinue it altogether.[149] Because the costs of producing such programming are fixed but station revenues are generally lower in mid-sized and smaller markets, this effect is felt most—and regulatory relief is needed most—in those markets.

Moreover, as has been Gannett's experience, in a market where two stations are commonly owned, those stations have strong economic incentives to differentiate their offerings—including news and other local programming—in order to capture different

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[149] Four years after the premiere of ABC22 News in 1999, WVNY in Burlington, Vermont, ended its news operation. The station's General Manager was quoted as saying "I believe this action underscores the difficulties that many small market televisions are experiencing. It is very expensive to run a news department and the continued loss is just not an economic standing that a business or its investors can continue and survive with." Jill Rosen, *Old Story, New Twist*, American Journalism Review (Dec./Jan. 2004), *available at* http://www.ajr.org/Article.asp?id=3480 (last visited Oct. 23, 2006) ; see also Mary Chao, *WUHF-TV's News Shifts to WROC in Management Deal*, Rochester Democrat & Chronicle, Aug. 31, 2005 ; Nate Hinkel, *Nexstar Defends Changes at Stations in Arkansas*, arkansasbusiness.com (Aug. 15, 2005), http://www.arkansasbusiness.com/article.aspx?aID=41492&page=1 (last visited Oct. 23, 2006); *Station Break*, Broad. & Cable (Aug. 9, 2004), http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleid=CA443621&display=archives&title=Station+Break&pubdate=08%2F09%2F2004 (last visited Oct. 23, 2006) (noting the decision made by WWTI General Manager David Males to cease producing a 6 pm and 11 pm nightly newscast at the station because of "economic considerations"); Robin Swartz, *WILX to Produce News for FOX Rival*, Lansing State J. (July 13, 2004), *available at* http://www.lsj.com/news/local/040713_tvnews_1b-2b.html (last visited Oct. 23, 2006) (indicating that WSYM closed their own local news gathering and production operation in favor of a news production agreement with a rival station, WILX); *N.C. TV Station To End Newscasts*, charlottebusinessjournal.com (Jan. 2, 2002), http://charlotte.bizjournals.com/charlotte/stories/2001/12/31/daily15.html (last visited Oct. 23, 2006) (WXLV-TV terminated its news operations after its 11 p.m. news broadcast on January 11, 2002, due to loss of audience and other economic pressures); Christina Hoag, *Channel 10 To Add Dr. Phil, Drop 5 p.m. News*, Miami Herald, http://www.neilrogers.com/news/articles/2004111803.html (last visited Oct. 23, 2006) (WPLG-TV has decided to replace its 5 p.m. daily newscast with other programming based on poor ratings and the desire to increase advertising revenue).

audience segments, rather than competing directly with one another for the same viewers. As the Commission previously has noted, "a single owner of multiple outlets may have stronger incentives to provide diverse entertainment formats, programs, and content on its multiple outlets than would separate station owners," thus increasing diversity.[150]

Further, the duopoly rule is not necessary to protect competition in local markets. In the unlikely event that a television group owner attempted to engage in anticompetitive behavior notwithstanding the natural discipline provided by the marketplace, any concerns would remain subject to government scrutiny and remediation under the federal antitrust regime and state unfair competition laws. As the Commission acknowledged in the *2002 Biennial Review Order*: "The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market."[151]

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[150] *Notice of Proposed Rulemaking in the Matter of 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecom. Act of 1996*; *Cross-Ownership of Broad. Stations and Newspapers*; *Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets*; *Definition of Radio Markets*, 17 FCC Rcd 18,503, 18,530 (¶ 82) (2002).

[151] In its discussion of the local television ownership rule, the Third Circuit found that the FTC/DOJ merger review process was not sufficient to guard against competitive harm because "the antitrust agencies typically review only large mergers," and because a large percentage of television station transactions fell below the threshold that renders a transaction reportable to federal antitrust authorities. *Prometheus*, 373 F.3d at 414 (citing 15 U.S.C. § 18a(a)). This statement, however, completely overlooks the availability of a panoply of additional enforcement tools that are at the disposal of federal and antitrust authorities, which allow transactions to be challenged either before the fact or authorize suits requiring divestitures after the consummation of a transaction regardless of the value of the transaction at issue. *See, e.g.*, 15 U.S.C. § 18 (prohibiting any merger or acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"); *id.* § 1 (prohibiting any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations"); *id.* § 45 (giving the FTC additional enforcement authority beyond its power to prohibit conduct that violates the Clayton Act or the Sherman Act). Because the Third Circuit did not consider the availability of these additional mechanisms as safeguards against anticompetitive behavior, the FCC is not precluded from relying on them in this remand proceeding.

The merger review process, whether under the Hart-Scott-Rodino Act or pursuant to the agencies' general Clayton Act authority, sufficiently protects against any isolated danger to competition in specific local markets. The federal merger review process is rigorous and ensures that mergers that require consideration receive a complete economic analysis.[152] The federal agencies primarily charged with antitrust enforcement—the DOJ and the FTC, as well as state attorneys general—have a panoply of powers at their disposal to obtain additional information from merging companies, and frequently exercise those powers to ensure that they have before them a complete set of facts upon which to base their competitive analysis. In addition, the antitrust laws permit private parties to challenge mergers, pre- or post-consummation.

This fully functioning and multi-layered scheme renders FCC consideration of competition concerns in the television industry unnecessarily duplicative and superfluous. Because market forces are more than sufficient to guard against anticompetitive behavior, and because there is a fully functioning prophylactic regime aside from the Commission's local television ownership rules that will prevent or provide a remedy for any anticompetitive actions that might nevertheless occur, competition concerns cannot provide a basis for continued FCC regulation of permissible local television ownership levels.

[152] Indeed, Joel I. Klein, then-chief of the Department of Justice's antitrust unit, stated that it "takes very careful study and analysis to find out if a given merger is likely to have anticompetitive effects. And *our job* is to make sure that the analysis is done properly and, when necessary, thoroughly." Joel I. Klein, *DOJ Analysis of Radio Mergers* 2-3 (presented Feb. 17, 1997), http://www.usdoj.gov/atr/public/speeches/1055.htm (emphasis added).

C. <u>Gannett's Experience Demonstrates the Considerable Public Interest Benefits To Be Attained Through Repeal of the Duopoly Rule</u>

Gannett's experience with television duopolies comports with evidence already before the Commission. Gannett's combined local television operations produce higher quality local news and more of it. Gannett presently owns three television duopolies: in Jacksonville, Florida (market 52); as of June 2006, in Denver, Colorado (market 18); and, as of August 2006, in Atlanta, Georgia (market 9). Each Gannett duopoly demonstrates that local television combinations can result in expanded local news operations and additional local content.

Specifically, duopolies permit Gannett to offer potential viewers expanded news offerings. In Jacksonville, home to Gannett's NBC affiliate WTLV and ABC affiliate WJXX, Gannett has expanded its award-winning local television news offerings to five hours a day. Similarly, in Denver, five hours of local news is available each day on Gannett stations. Gannett's acquisition of My Network TV affiliate KTVD allowed the company to expand its news offerings to KUSA's new sister station. Thus, KTVD has been transformed from a pure entertainment channel to an additional local news outlet. In early December 2006, Gannett plans to add a local morning program that will allow KTVD to <u>compete</u> not only with its sister station's programming, NBC's "Today," but also ABC's "Good Morning America" and CBS's "Early Show." The two-hour KTVD morning show will focus on local issues and feature journalists hired exclusively for KTVD, thus bringing a new news and information offering to the market. Finally, within a few weeks of acquiring its duopoly station WATL-TV in Atlanta, Gannett added a 10 PM newscast to that station, thereby immediately expanding the number of news sources available in the market.

D. <u>The Commission Should Eliminate The Top 4 Restriction</u>

Given the existing record, the dramatic developments that have shaped the media marketplace since the *2002 Biennial Review Order*, and the benefits to be achieved through television duopolies, the Commission should further liberalize the television duopoly rule. Should the Commission determine that some constraints on local television ownership remain necessary in the public interest, the record justifies elimination of the Top 4 restriction.

The changes occurring since the Commission's last periodic review resoundingly confirm its prior finding that the current television duopoly rule no longer serves, and in many important respects is inimical to, the Commission's public interest objectives in protecting and promoting localism, diversity, and competition. Relaxation of the rule will give local broadcasters the incentive and ability to operate more efficiently and will enhance their local news and informational offerings. In fact, it is the most direct and practical action the Commission can take to foster its public interest goals. Further deregulation also represents the agency's best hope for ensuring the continued viability of free, over-the-air television broadcasting in the highly competitive media marketplace of the 21^{st} century.

The Commission should carefully craft whatever rule it ultimately adopts so as to permit combinations that would benefit local communities, particularly, as outlined above, where a duopoly would result in additional or higher quality local news and information or other community oriented programming. Such consolidations have been shown to be especially beneficial in small markets, where local television service may be limited to the ABC, CBS, NBC, and Fox affiliates. Because, on its face, the Top 4 restriction would prohibit duopolies in markets where television combinations do the most good, it should be eliminated. Given the abundance of media outlets available even in smaller markets, combinations involving two network affiliated stations will not result in any appreciable difference in viewpoint diversity. Moreover, the existing antitrust regime described above would be more than sufficient to address any remaining competition or diversity-related concerns the Commission might have.

IV. CONCLUSION

For the reasons stated above, Gannett respectfully submits that the Commission must repeal the newspaper/broadcast cross-ownership ban and liberalize the local television ownership rule.

Respectfully submitted,

GANNETT CO., INC.

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October 23, 2006

<u>ATTACHMENT A</u>

The Arizona Republic
Front Page
September 5, 2006

THE ARIZONA REPUBLIC
azcentral.com
TUESDAY, SEPTEMBER 5,

TELEVISION

Katie, Rosie and Sean take new spots today

From nighttime to daytime to local: Get ready for the 'biggest one-day talent change in recent memory'

KATIE COURIC
'CBS EVENING NEWS'
6 tonight
on Channel 5 (KPHO)

ROSIE O'DONNELL
'THE VIEW'
10 a.m. today
on Channel 15 (KNXV)

SEAN McLAUGHLIN
'CBS 5 NEWS'
4, 5, 6:30 and 10 p.m. today
on Channel 5 (KPHO)

By Bill Goodykoontz
and Randy Cordova
THE ARIZONA REPUBLIC

Do not adjust your set.

Certain of your regular shows may look a little different today. That's by design.

If television is all about personalities — and it is — the medium is undergoing an extreme makeover today. High-profile changes are afoot: Katie, Rosie and Sean, take a bow.

After a self-imposed TV exile, Rosie O'Donnell sidles up to the table on *The View*, replacing the spot left open by the departure of her nemesis Star Jones Reynolds. Local favorite Sean McLaughlin returns to Arizona after a stint on MSNBC, trying to recapture his former magic when he begins forecasting weather and more for Channel 5 (KPHO).

And, you may have heard about this one a time or two, Katie Couric starts as anchor of the *CBS Evening News*, becoming the first woman to tackle such a job solo. Thus, the changes range from histrionic to historic, with a little local interest thrown in for good measure.

If TV viewers value anything, it's consistency. When you turn on your morning show, you know what to expect and get comfort from finding it there. Certainly that's true of news broadcasts, as well. These people are in our homes so often they might as well rent a room; we're used to seeing the same old folks in the same old spot.

No longer.

"I would say this is the biggest one-day talent change in recent memory," said Craig Allen, a journalism professor at Arizona State University. "Viewers will have three riveting 'look-in' attractions."

Although the changes add up to a pretty momentous shift in the television landscape, there is an individual story behind each.

KATIE, ROSIE AND SEAN: The story behind each high-profile TV move. Page A4